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No. 06-1082

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2006

COMMONWEALTH OF THE STATE OF VIRGINIA

Petitioner,

vs.

DAVID LEE MOORE,

Respondent.

BRIEF OF WAYNE COUNTY, MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE COMMONWEALTH OF VIRGINIA

KYM L. WORTHY
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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

Does the Fourth Amendment require the suppression of evidence obtained incident to an arrest that is based upon probable cause, where the arrest violates a provision of state law?

TABLE OF CONTENTS

PAGE

Index of Authorities ..... -3-

Statement of Questions Presented for Review .. -1-

Interest of the Amicus ..... -5-

Argument ..... -6-

A. There Was No Fourth Amendment Violation ..... -6-

B. Application of An Exclusionary Sanction Is Inappropriate Even If A Fourth Amendment Violation Occurred. ..... -12-

Relief ..... -15-

INDEX OF AUTHORITIES

CASE	PAGE
Atwater v. City of Lago Vista, 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001)..	-6-
Barry v. Fowler, 902 F.2d 770, 772 (9th Cir.1990)	
California v Greenwood, 486, US 35, 44 108 S Ct 1625, 1631, 100 L Ed 2d 30 (198.....	-11-
Devenpeck v. Alford, 543 U.S. 146, 152, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004)	-11-
Fields v. City of South Houston, 922 F.2d 1183, 1189 (5th Cir.1991)	-11-
Hudson v. Michigan, --- U.S. ----, 126 S.Ct. 2159, 2163, 165 L.Ed.2d 56 (2006) ..	-13-
Knight v. Jacobson, 300 F.3d 1272, 1276 (11th Circ. 2002	-11-
Knowles v. Iowa, 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998).	-6-
Moore v. Commonwealth, 622 S.E.2d 253 (Va.App.,2005).	-8-
Moore v. Commonwealth, 636 S.E.2d 395, 398 (Va.,2006).	-8-
People v. Hamilton, 465 Mich. 526, 638 N.W.2d 92 (Mich, 2002)	-11-
Pyles v. Raisor, 60 F.3d 1211, 1215 (6th Cir.1995)	-11-

Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151,
150 L Ed 2d 272 (2001) ..... -13-

Street v. Surdyka, 492 F.2d 368, 372
(4th Cir.1974) ..... -11-

United States v. 12 200-Foot Reels of
93 S.Ct. 2665, 668, 37 L Ed 2d 500 (1973). .. -5-

Walker v. City of Pine Bluff,
414 F.3d 989, 992 (CA 8, 2005) ..... -12-

Woods v. City of Chicago,
234 F.3d 979, 992-95 (7th Cir.2000) ..... -11-

1 LaFave, Search and Seizure 11-

Interest of the Amicus

Amicus is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within his jurisdiction, has a vital interest in the outcome of the current litigation, as it may well affect the execution of his constitutional and statutory duties, particularly with regard to child abuse and domestic violence cases.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits *Amicus* to file a supporting brief without permission of the parties.

No party or counsel connected with a party contributed any funds towards this brief nor contributed in any way to its writing. Counsel were notified timely of the intent to file as amicus.

Argument

A. There Was No Fourth Amendment Violation

Amicus believes it wise always to begin with the actual language of the constitutional provision or provisions at issue, for reference only to the judicial gloss which has been given the relevant provisions or provisions can lead one far astray. As has been noted in a related context,

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance.[1]

Amicus thus begins with the relevant text.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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1. *United States v. 12 200-Foot Reels of Super 8mm. Film,* 413 US 123, 127, 93 S.Ct. 2665, 668, 37 L Ed 2d 500 (1973).

Nowhere does the term "arrest" appear in the Fourth Amendment; the question here, then, is whether the custodial seizure of a person on probable cause that individual has committed a criminal offense under state law is an "unreasonable seizure" of the person under the Fourth Amendment, where state law requires that the person seized be released with a summons rather than taken into custody where none of several exceptions is met.

The Virginia Supreme Court found, contrary to the en banc Virginia Court of Appeals, that a custodial arrest for a criminal misdemeanor where, under state law, the detention of the individual charged should have ended on the writing of a summons after agreement of the arrestee to appear on the summons is not only a violation of state statute but of the Fourth Amendment as well. The search incident the custodial arrest revealing 16 grams of crack cocaine and $516.00 in case on respondent's person was therefore found improper and the evidence suppressed. The difference of opinion between the Virginia Supreme Court and the en banc Virginia Court of Appeals is predicated on their different views of *Knowles v. Iowa,* 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998) and *Atwater v. City of Lago Vista,* 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001).

In *Knowles* the defendant was not arrested by the police, though he could have been. Instead, he was given a ticket and released. Nonetheless he was subjected to a search incident arrest, including a search of his automobile, one permissible had he been, as he could have been, taken into custody rather than detained and cited. This Court held that where there is no arrest—even if one is permissible by law—there can be no search incident arrest. The Virginia Supreme Court found *Knowles* controlling, finding that even when there *is* an arrest on probable cause, if that arrest should not, as a matter of state

law, have been accomplished the Fourth Amendment is violated.

The en banc Virginia Court of Appeals, on the other hand, found only a violation of state law but no violation of the Fourth Amendment in this circumstance, largely in reliance on *Atwater v. City of Lago Vista,* 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001). There a woman was arrested and taken into custody for an offense which carried no possible penalty of incarceration but only a fine. This Court held the arrest proper. The en banc Virginia Court of Appeals held that because the officers had probable cause that respondent had committed a criminal offense, his arrest did not violate the Fourth Amendment. See *Moore v. Commonwealth,* 622 S.E.2d 253, 256 (Va.App.,2005). The Virginia Supreme Court found *Atwater* inapposite given the specific statutory authorization under Texas law for an arrest for violation of the seatbelt law that Atwater had violated. Because formal arrest was not authorized here by state law while the arrest was authorized in *Atwater*, the Virginia Supreme Court found that the en banc Virginia Court of Appeals had erred in concluding that the violation of state law was not a constitutional violation. See *Moore v. Commonwealth*, 636 S.E.2d 395, 398 (Va.,2006).

This morphing of violation of state statutes into constitutional violations is unsound; the en banc Virginia Supreme Court majority opinion has the better of the argument. The consequences for violations of state statutes should remain, under what Justice Harlan often referred to as "our federalism," with the various state legislatures, who, as the People's democratically elected representatives, may make the pertinent policy decisions involved.

The Fourth Amendment establishes the "floor:" arrests—seizures of individuals to hold them to answer for a crime (unless and until released on bail)—require probable cause. But as a matter of the Fourth Amendment, they require no more: "In conformity with the rule at common . law, a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." *Devenpeck v. Alford,* 543 U.S. 146, 152, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004). And *Atwater* itself, pointing in part to the need for clarity and simplicity, flatly stated that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, *without violating the Fourth Amendment*, arrest the offender" (emphasis added). To be sure, under some circumstances that arrest may violate *state* law, but those circumstances, and the consequences, if any, for the violation of state law, are within the purview of state legislatures.

One noted commentator has observed that this Court has "*never* taken the position that an arrest made on probable cause violates the Fourth Amendment merely because a taking of [a suspect into] custody was deemed unnecessary (as a matter of state law or otherwise). 1 LaFave, *Search and Seizure* § 1.5(b), p. 171 (4th ed.2004) (emphasis in original). Moreover, Professor LaFave has also expressed the view that violations of state law with regard to searches or seizures do not "by virtue of that fact become a Fourth Amendment violation." 1 LaFave, *Search and Seizure* § 1.5, p. 156 (4th ed.2004). This Court made the point in *California v Greenwood*, 486, US 35, 44 108 S Ct 1625, 1631, 100 L Ed 2d 30 (1988):

> Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution. We have never intimated, however, that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs....Respondent's argument is no less than a suggestion that concepts of privacy under the laws of each State are to determine the reach of the Fourth Amendment. We do not accept this submission.

The same principle applies to seizures of the person. Whether a seizure is reasonable—when it takes the form of an arrest—does not "depend on the law of the particular State in which the [arrest] occurs," as the reasonableness of the seizure is not determined by the "concepts of privacy under the laws of each State"; rather, the arrest is constitutionally reasonable if based on probable cause to believe a state criminal law has been violated.

The petitioner has well stated the authority from other jurisdictions holding contrary to the Virginia Supreme Court, and amicus will not belabor the point, but will expand on only one example, that of warrantless misdemeanor arrests. Though this Court has never addressed the question whether the common-law requirement that arrests for misdemeanors are permissible only when the violation occurs in the presence of the arresting officer is a part of the Fourth Amendment's reasonable requirement, see *Atwater*, 532 US at 341; 121 S Ct at 1550, those courts that have addressed

the question have answered in the negative.[2] A state can, then, permit a misdemeanor arrest on probable cause, where the offense did not occur in the presence of the officer. But what if state statute codifies the common-law rule, and an arrest is accomplished on probable cause for an offense not committed in the presence of the officer? State law, in this circumstance, has added a layer of privacy to that provided by the Fourth Amendment, but whether to provide that extra protection is a matter of state law, and the consequences, if any, that should be imposed for the violation of state statute are also a matter for the state legislature. And a number of courts, such as the Michigan Supreme Court, have so held. See e.g. *People v. Hamilton,* 465 Mich. 526, 638 N.W.2d 92 (Mich, 2002).

The en banc Virginia Court of Appeals was correct and the Virginia Supreme Court mistaken. The arrest here was constitutional, as was the search incident arrest, under the Fourth Amendment.

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2. See e.g. *Street v. Surdyka,* 492 F.2d 368, 372 (4th Cir.1974), *Woods v. City of Chicago,* 234 F.3d 979, 992-95 (7th Cir.2000); *Pyles v. Raisor,* 60 F.3d 1211, 1215 (6th Cir.1995); *Fields v. City of South Houston,* 922 F.2d 1183, 1189 (5th Cir.1991); *Barry v. Fowler,* 902 F.2d 770, 772 (9th Cir.1990); *Knight v. Jacobson,* 300 F.3d 1272, 1276 (11th Circ. 2002)("every circuit that has addressed the issue has held that the Fourth Amendment does not include an in-the-presence requirement for warrantless misdemeanor arrests").

B. Application of An Exclusionary Sanction Is Inappropriate Even If A Fourth Amendment Violation Occurred.

Even if this Court were to hold that the custodial arrest of respondent in circumstances where state law required issuance of a summons is unreasonable under the Fourth Amendment, no exclusionary sanction should apply. Amicus suggests that the exclusionary rule should be viewed as inapplicable in circumstances where, had a person innocent of any crime[3] brought suit under 42 U.S.C. 1983, application of principles of qualified immunity would result in dismissal of the action. If the conduct of the police is reasonable so that it would not result in the awarding of monetary damages, then exclusion of the truth in a criminal proceeding should not occur.

Assume a case where the Fourth Amendment is violated but no derivative evidence is found, and the individual aggrieved files suit based on the violation. The defendant officer is entitled to summary judgment on the grounds of qualified immunity if his or her mistake was reasonable though the result was a violation of the Fourth Amendment. An innocent person would receive no redress, and no "deterrent" sanction would be applied to the police. See e.g. *Walker v. City of Pine Bluff*, 414 F.3d 989, 992 (CA 8, 2005)("the qualified immunity privilege extends to a police officer who is wrong, so long as he is reasonable, the governing standard for a Fourth Amendment unlawful arrest claim 'is not probable cause in fact but arguable

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3. Or even guilty of one, for that matter, but he example of an innocence person well makes the point here.

probable cause···'"). But in that same situation, if evidence is found it is suppressed despite the reasonableness of the error of the police. This is a decidedly odd state of affairs.

Amicus submits that application of the exclusionary rule should occur only upon the confluence of two circumstances: 1)the determination at a suppression hearing of a but/for causal connection between the violation of the Fourth Amendment and the evidence discovered (and the absence of any exception to exclusion, such as independent source, purged, taint, attenuation, or inevitable discovery), see *Hudson v. Michigan*, ··· U.S. ····, 126 S.Ct. 2159, 2163, 165 L.Ed.2d 56 (2006); and 2)the conclusion by a judge after a suppression hearing[4] that the officer(s) involved would not be entitled to qualified immunity in a civil suit; that is, a conclusion that the error that occurred was unreasonable. See *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L Ed 2d 272 (2001). If causation is found lacking, or if the police would be entitled to qualified immunity either because a)the constitutional principle involved was not clearly established at the time of their conduct, or b)because it was so established but their mistake was reasonable, then exclusion of evidence should not

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4. The difference between the suppression hearing and the qualified immunity determination would be that at the suppression hearing under Rule 104(a) the judge must take necessary testimony and make credibility determinations and reach a final conclusion on the matter. But the inquiry as to whether a constitutional right has been violated, and whether the police error was reasonable, should be the same as in the qualified immunity situation.

result, just as the payment of damages to an innocent (or even guilty) defendant would not result.

Here, then, if the conduct of the officers is found to violate the Fourth Amendment, exclusion should not result because there was no clearly established Fourth Amendment principle to that effect at the time they acted. Because qualified immunity would be granted in a civil suit, exclusion would be inappropriate here.

Conclusion

WHEREFORE, this Court should reverse the Virginia Supreme Court.

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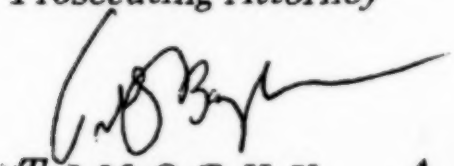

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